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November 19, 2004

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VIA ELECTRONIC MAIL

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Docket No. R-1210; Regulation E -Electronic Fund Transfers

Ladies and Gentlemen:

We appreciate the opportunity to comment on the Board of Governors' (the "Board") proposal to amend Regulation E, Electronic Fund Transfers, 12 C.F.R. Part 205, and to revise Supplement I to Part 205 – Official Staff Interpretations (the "Staff Interpretations"). 69 *Fed. Reg.* 55996 (September 17, 2004) (the "Proposal").

As a financial services law firm, Schwartz & Ballen LLP provides advice to financial institutions concerning matters relating to compliance with Regulation E and the Electronic Fund Transfer Act (the "EFTA"). Because our clients will be affected by the Board's proposal, we believe it is appropriate to comment on certain aspects of the Proposal as it relates to consumer authorizations for preauthorized electronic fund transfers. We also ask that the Board clarify the scope of the Proposal as it relates to the authorization of electronic check conversions.

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PREAUTHORIZED TRANSFERS

Regulation E provides that preauthorized electronic fund transfers from a consumer's account may be authorized only by a writing signed or similarly authenticated by the consumer. The person that obtains the authorization is to provide a copy to the consumer. 12 C.F.R. § 205.10(b). The Staff Interpretations provide that a tape recording of a telephone conversation with a consumer who agrees to preauthorized debits does not constitute written authorization under § 205.10(b) of Regulation E. *See* Staff Interpretations § 205.10(b)-3. The Proposal indicates that this interpretation will be withdrawn to address concerns that the guidance may conflict with the Electronic Signatures in Global and National Commerce Act ("E-SIGN Act") (P.L. 106-229).

The Proposal deletes the last sentence of Staff Interpretations § 205.10(b)-3, which currently provides as follows:

A tape recording of a telephone conversation with a consumer who agrees to preauthorized debits also does not constitute written authorization for purposes of this provision.

We support the deletion of this sentence from the Staff Interpretations as proposed. Its removal will benefit consumers and merchants because it will provide additional flexibility and convenience to consumers who wish to authorize recurring electronic fund transfers from their asset accounts orally via telephone. By removing this sentence from Staff Interpretations § 205.10(b)-3, the Board also will eliminate current uncertainty regarding the requirements for preauthorized transfers under Regulation E in light of the enactment of the E-SIGN Act.

However, in order for the Board's action to be fully effective, we also believe that it is also important for the Board to eliminate the first sentence in Staff Interpretations § 205.10(b)-3 as well. That provision provides as follows:

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The requirement that preauthorized EFTs be authorized by the consumer “only by a writing” cannot be met by a payee’s signing a written authorization on a consumer’s behalf with only an oral authorization from the consumer.

If this provision of the Staff Interpretations is not deleted, there will still be uncertainty as to whether oral authorizations are permitted under Regulation E, for this provision of the Staff Interpretations could continue to be regarded as in conflict with the E-SIGN Act. It would seem inconsistent with the Board’s objective to clarify the interplay between the E-SIGN Act and Regulation E for this provision to remain in the Staff Interpretations. Accordingly, in order to eliminate this uncertainty and any possibility of continued confusion, we recommend that the Board delete the first sentence of Staff Interpretations § 205.10(b)-3 as well.

ADDITIONAL GUIDANCE

In connection with the proposed change to the Staff Interpretations, we request that the Board provide additional guidance on three related issues that are raised by the use of oral communications to authorize preauthorized transfers.

Providing the Consumer With a Copy of the Authorization

Regulation E requires that the person who obtains the authorization provide a copy to the consumer. Nothing in Regulation E or in the Staff Interpretations indicates when the terms of the authorization are to be provided to the consumer. In light of the E-SIGN Act, it would appear that the person who obtains the consumer’s oral authorization could orally provide the consumer with a copy of the terms of the authorization during the conversation, send a hard copy of the authorization to the consumer (*e.g.*, via U.S. mail or e-mail) or otherwise make a copy of the authorization available to the consumer (*e.g.*, on a website).

In the context of a telephone authorization, consistent with the E-SIGN Act, we believe that a merchant could provide the terms of the authorization to the consumer orally over the telephone at the time the consumer authorization is obtained.

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We anticipate that many merchants may also consider providing the consumer with a copy of the authorization in writing subsequently, or otherwise make the terms of the authorization available to the consumer, such as on the merchant's website. We believe that the Board should confirm that if authorized by the E-SIGN Act, delivery of the authorization to the consumer orally satisfies the requirement in § 205.10(b) of Regulation E that the person obtaining the authorization shall provide a copy to the consumer.

We also ask that the Board clarify whether the copy of the authorization constitutes information that otherwise must be provided in writing under Regulation E and the EFTA. The status of the copy of an authorization as information required to be in writing is important for determining whether or not a merchant must comply with § 101(c) of the E-SIGN Act when delivering certain information by means of an electronic communication. Section 101(c) of the E-SIGN Act provides that if a statute or regulation requires "that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing," the person seeking to use an electronic record to provide or make available such information must satisfy certain requirements under the E-SIGN Act. (15 U.S.C. § 7001(c)(1)). It is our view that the copy of the authorization under § 205.10(b) of Regulation E does not constitute information required to be in writing under Regulation E because no such requirement is set forth in the regulation. Accordingly, we request that the Board clarify that neither the EFTA nor Regulation E require that the person obtaining the authorization provide a written copy of the authorization to the consumer.

Obtaining Authorizations Via VRUs

We also ask that the Board confirm that Voice Response Units ("VRUs") and Interactive Voice Response units ("IVRs") may be used to obtain authorizations for preauthorized transfers under Regulation E. Increasingly, merchants and financial institutions are using IVRs and VRUs to provide services to consumers. Consumers are

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benefited when using IVRs and VRUs because they typically are available on a 24-hour basis, when live operators may not be available. IVRs and VRUs also provide convenient and ready access to electronic services to consumers who do not have access to computers or to consumers who find computers too complex to use.

We see no legal or practical reason why merchants, in reliance on the E-SIGN Act, should not be able to obtain a consumer's authorization for a preauthorized transfer by using IVRs and VRUs, in addition to a traditional telephone conversation. For example, the consumer could press certain buttons on a telephone to indicate to the IVR/VRU that the consumer agrees to the terms of an authorization that the IVR/VRU previously disclosed orally to the consumer over the telephone. Alternatively, to obtain the consumer's authorization, the consumer could say "yes" or "no" to an IVR/VRU that recognizes human speech. If a IVR/VRU provided the same disclosures and obtained the same authorization from the consumer as would occur during a telephone call with an actual representative of the merchant, the IVR/VRU should be equally acceptable as a form of authorization under the E-SIGN Act and under Regulation E.

ELECTRONIC CHECK CONVERSION

We further request the Board to clarify that its interpretation of the authorization of electronic check conversions via automated clearinghouse ("ACH") transactions relates only to the EFTA and Regulation E, and not to any applicable authorization requirements under other law, such as state law. As the Board is aware, the EFTA provides that a state law will not be preempted as inconsistent with the EFTA if the protection the state law affords consumers is greater than that provided under the EFTA. 15 U.S.C. § 1693q. State law that provides for additional consumer authorization requirements could well be an example of such a state law that would not be preempted under the EFTA. The Proposal could be read as specifying the only authorization requirements for electronic check conversions. Accordingly, we suggest that the Board clarify that its Regulation E requirements regarding authorization for electronic check

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conversions address only the EFTA and not other authorization requirements that may apply under other law.

Thank you for this opportunity to comment on the Proposal.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'G. Schwartz', with a long horizontal flourish extending to the right.

Gilbert T. Schwartz